

# THE STORIES THAT CRIPPLE US: THE CONSEQUENCES OF THE MEDICAL MODEL OF DISABILITY IN THE LEGAL SPHERE

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*The legal sphere in Aotearoa is becoming more aware of its historically poor representation of gender and racial minorities. However, disabled people continue to be excluded and are often not recognised as an oppressed social group. When stories about disabled people are told in the legal sphere, our existence is diminished to medicalised narratives. These stories pathologise our existence, perpetuating a sense of othering for disabled people. This has a particular impact on disabled students of the law, who are exposed to negative attitudes towards disability through the judiciary and the critical avoidance of disability issues by legal academics. This article demonstrates how the pervasiveness of the medical model in judicial language and legal pedagogy fails to create a space of belonging for disabled people, failing the one in four members of the New Zealand population who are disabled. Overall, it demonstrates a need to undergo a "cripping" of legal education by incorporating socially oriented models of disability into legal study. This will require an adoption of both the traditional social model of disability and Whānau Hauā, an indigenous model of disability. Only by dislodging the medical model of disability will the law become a space of belonging for disabled people.*

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## **I INTRODUCTION**

Stories about [disabled people] are boring. As predictable and ubiquitous as they are dangerous, normate narrations of our lives are as straight as they come: one-dimensional narratives of tragic loss and/or progressive normativity. We are dying or overcoming. We become a burden or an inspiration. We desire vindication or marriage. Our entire narrative worlds are defined by our Otherness, yet revolve around the

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normates and the normative. These stories cut straight to the point, using – and used as – well-steeped, easily readable metaphors bolstered by the requisite piano-based musical cues. If we didn't know us better, we would bore us.<sup>1</sup>

When interacting with the law, both in pedagogy and practice, disabled people are exposed to harmful stories which bolster able-bodied norms. While critical legal theorists have dedicated their careers to scrutinising the way in which the law frames and minimises the people behind the facts of a case, they are yet to similarly acknowledge disability as "a social and political construct derived from a history of stigmatization and exclusion".<sup>2</sup> As a result, the pervasiveness of the medical model of disability in the New Zealand legal sphere has largely gone unnoticed. One in four New Zealanders experience disability and the unique barriers they face are largely legal in nature, whether that be inequitable policy and legislative decisions (such as disparities in social welfare), or issues likely to give rise to litigation (such as human rights proceedings and family law proceedings).<sup>3</sup> Given these unique barriers, it is crucial that our legal system critically and positively engages with disability. To achieve this, the legal sphere must become a space of belonging for disabled people.

The legal sphere continues to rely "on medical and scientific definitions and measurements of bodies".<sup>4</sup> When engaging with the legal system, disabled people thus undoubtedly experience a feeling of "outsiderness".<sup>5</sup> At the judicial level, the pervasive influence of the medical model of disability can be seen in judicial language. This language pathologises disabled people, telling stories as "predictable and ubiquitous as they are dangerous".<sup>6</sup> At a pedagogical level, the failure of legal education to *challenge* these negative stories contributes to a "manifestly academic form of Othering".<sup>7</sup> This is felt at an emotive level by disabled students of the law, forcing us to engage in an

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- 1 Joshua St Pierre and Danielle Peers "Telling Ourselves Sideways, Crooked and Crip: An Introduction" (2016) 5 *Canadian Journal of Disability Studies* 1.
  - 2 Arlene S Kanter "The Relationship between Disability Studies and Law" in Arlene S Kanter and Beth A Ferri (eds) *Righting Educational Wrongs: Disability Studies in Law and Education* (Syracuse University Press, Syracuse, 2013) 1 at 35–36.
  - 3 Office for Disability Issues "Key facts about disability in New Zealand" (1 December 2016) <[www.odi.govt.nz](http://www.odi.govt.nz)>.
  - 4 Carey-Ann Morrison and others "Disabled people's embodied and emotional geographies of (not)belonging in Aotearoa New Zealand" (2020) 62 *Health & Place* 1 at 5.
  - 5 At 5.
  - 6 St Pierre and Peers, above n 1, at 1.
  - 7 David Bolt "Introduction: Avoidance, the academy, and activism" in David Bolt and Claire Penketh (eds) *Disability, Avoidance and the Academy: Challenging resistance* (Routledge, London, 2016) 1 at 2.

ongoing battle to belong, a process which involves "'effort', 'strain' 'suffering' and can be 'exhausting and isolating'".<sup>8</sup>

Before launching into this discussion, I will provide a brief explanation of my choice of language and research approach.

### *A Language*

Throughout this article I use the term "disabled person/people". While some disability studies literature advocates for "person-first" language, it has been well established that identity-first language is more in line with social models of disability.<sup>9</sup> Identity-first language gives credence to the idea of disability as an identity that is capable of being politicised. Comparatively, person-first language has "the potential to disconnect the disability or to make it appear that the disability is of a second order nature".<sup>10</sup> Furthermore, many disabled people, myself included, believe that it is important to reclaim once-stigmatised language, and reject euphemisms like "differently abled".

In referring to "disabled people", I use the definition provided by the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD):<sup>11</sup>

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

There is also ongoing conflict in disability studies literature about the terms "ableism" or "disablism". Some academics claim that there is a subtle difference between the two,<sup>12</sup> but this article uses "ableism".

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8 Desiree Fields "Emotional refuge? Dynamics of place and belonging among formerly homeless individuals with mental illness" (2011) 4 *Emotion, Space and Society* 258 as cited in Morrison and others, above n 4, at 2.

9 Richard Devlin and Dianne Pothier "Introduction: Towards a Critical Theory of Dis-Citizenship" in Dianne Pothier and Richard Devlin (eds) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (UBC Press, Vancouver, 2006) 1 at 3.

10 At 4.

11 United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 March 2007, entered into force 3 May 2008), art 1.

12 See Paul Harpur "Sexism and racism, why not ableism? Calling for a cultural shift in the approach to disability discrimination" (2009) 34 *Alternative LJ* 163 at 163.

## ***B Research Approach and Limitations***

As articulated by Snyder and Mitchell, "historically, disabled people have been the objects of study but not the purveyors of the knowledge base of disability".<sup>13</sup> As a result, tertiary education and academic research have perpetuated negative models of disability. According to Oliver, research about disabled people has failed to "accurately capture and reflect the experience of disability from the perspective of disabled people themselves".<sup>14</sup> Disability research has prioritised the knowledge of "experts" rather than "disabled people's expert knowledge – embodied and emotional – about their own lives".<sup>15</sup> Many disability studies academics have therefore found a home in emancipatory research. Researchers are encouraged to give "over ultimate control to the research subjects", breaking down the barrier between researcher and researched.<sup>16</sup> Unfortunately, it is beyond the scope of this article to feature the voices and experiences of other disabled students and professionals of the law. Because I am not able to centre the voices of others, I will instead centre my own experience of being a disabled woman at law school in Aotearoa. In relying on the expertise of academics as well as my own embodied and subjective experiences, I heed Oliver's guidance:<sup>17</sup>

The research act is not an attempt to change the world through the process of investigation but an attempt to change the world by producing ourselves and others in different ways from those we have produced before, intentionally or not.

The experience of disabled people differs greatly depending on their membership with other minority groups. For example, disabled Māori face extra societal barriers in Aotearoa, and those within the learning disability community are excluded from both the legal system and the academic world. In sparking conversation with this article, I hope to pave the way for a more nuanced and intersectional approach in the future.

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13 David T Michell and Sharon L Snyder *The Biopolitics of Disability: Neoliberalism, Ablenationalism, and Peripheral Embodiment* (University of Michigan Press, Ann Arbor, 2015) as cited in Jay Timothy Dolmage *Academic Ableism: Disability and Higher Education* (University of Michigan Press, Ann Arbor, 2017) at 4.

14 Michael Oliver *Understanding Disability: From Theory to Practice* (2nd ed, Palgrave Macmillan, Basingstoke, 2009).

15 Morrison and others, above n 4, at 3.

16 Oliver, above n 14, at 115.

17 At 116.

## ***II THE DISABLED EXPERIENCE OF BELONGING***

### ***A Personal Experience of Law School***

This article was inspired by my personal experiences of law school as a disabled student, and my attempt to find a "space of belonging" in a sphere that pathologises my existence. This is highlighted by two formative experiences in which the issue of disability was raised in a law class.

When I was in my first year of law school, I attended a class in which students were encouraged to debate the ethical and legal implications of assisted suicide for those with lifelong impairments and illness. As expected, the students rose to the challenge, passionately but disconnectedly arguing about showing "mercy" to the weak and vulnerable. The second experience was in my second year, in a compulsory torts class discussing the Accident Compensation Act 2001. The question of whether the birth of a disabled person could be classed as an "accident" was posed to the class. Similarly to my previous experience, the conversation descended into a class debate about the quality of life of disabled individuals. At the end of both classes, I left shaking and tearful. Both times, I wanted to raise my hand and negate the arguments which suggested my existence was of less value. However, I was too afraid to do so, not wanting to "out" myself further as the token disabled person in the room (as I am already aware of being labelled this way by law professors and fellow students). In not speaking out against the ableist attitudes being expressed, I sacrificed my identity for belonging. This ultimately highlights how disabled people, like other minorities, must "hang their personal skins on hooks outside the door of the law school" to belong.<sup>18</sup> These stories barely scrape the surface of the other issues of physical inaccessibility and systemic ableism which exist in legal education.

I hope for my experiences to serve as a backdrop to highlight how medicalised narratives of disability create spaces of exclusion for disabled people in the law. These stories also reflect the two areas in which disabled people are othered in the legal sphere through negative framing and storytelling. The first is negative judicial language, and the second is legal pedagogy's failure to resist these narratives.

### ***B Disability in Aotearoa: Facts and Law***

This sense of othering that disabled people experience in the legal sphere is particularly pertinent given disabled people are the world's largest minority, and yet continue to experience poor life outcomes compared to their non-disabled counterparts. In 2016, the Office for Disability Issues found that approximately one in four New Zealanders experience disability.<sup>19</sup> The rate of disability amongst Māori was also found to be higher than amongst Pākehā.<sup>20</sup> It has been found that 40 per cent of

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18 Kim Brooks and Debra Parkes "Queering legal education: A project of theoretical discovery" (2004) 27 *Harv Women's LJ* 89 at 90.

19 Office for Disability Issues, above n 3.

20 Office for Disability Issues, above n 3.

disabled women experience physical violence from an intimate partner over their lifetimes, compared with 25 per cent of non-disabled women.<sup>21</sup> A 2019 CCS<sup>22</sup> report found that disabled people under 65 are almost 2.5 times more likely to report not having enough income,<sup>23</sup> and Stats NZ reported that disabled children live in material hardship at more than double the rate of non-disabled children.<sup>24</sup> The disability support system underserves all disabled people, but especially Māori and Pasifika. In 2020, the median weekly disability allowance rate received by European people was \$13.65, but only \$9.70 for Māori, and \$6.15 for Pasifika.<sup>25</sup> Given these sobering statistics, and their potentially litigious consequences, it is crucial that our future legal system can engage with disabled people in a way that upholds their mana and autonomy.

As it stands, the legal sphere sees disability as an individual issue needing to be fixed. This framing of disability fails to carve out a space of belonging for disabled people at all levels of the law. According to Sullivan, legal attitudes towards disability will only shift if the "footing of the medical model" is displaced.<sup>26</sup> This article argues that the legal sphere must dispense with the medical model of disability in favour of a socially oriented model that upholds the true autonomy of the disabled experience. I will now unpack the medical model of disability and the consequences it has on the disabled experience. The pervasiveness of the model in the legal sphere is best demonstrated through its prevalence in judicial language. In analysing judicial language, I will demonstrate how the law fails to make a space of belonging for disabled people. This culminates in the embodied and emotive experience of "otherness" that I have described above.

### ***III THE MEDICAL MODEL OF DISABILITY***

#### ***A Models of Disability***

When referring to a "model" of disability, this article refers to the different narratives or discourses told about disabled people throughout history. As Foucault taught, discourse is a locus of power which reflects the power structure of society. Therefore, models of disability are socially constructed "truths"

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- 21 Janet L Fanslow and others "Lifetime Prevalence of Intimate Partner Violence and Disability: Results from a Population-Based Study in New Zealand" (2021) 61 *Am J Prev Med* 320 at 324.
- 22 Formerly the Crippled Children Society, CCS is the largest pan-disability support and advocacy organisation in New Zealand.
- 23 Sam Murray "The state of wellbeing and equality for disabled people, their families, and whānau" (4 December 2019) CCS Disability Action <[www.ccsdisabilityaction.org.nz](http://www.ccsdisabilityaction.org.nz)> at 10.
- 24 Stats NZ "Child poverty statistics for households with disabled people released for the first time – corrected" (23 February 2021) <[www.stats.govt.nz](http://www.stats.govt.nz)>.
- 25 Sarah Robson "Government urged to provide flat, fair disability allowance for all" *Radio New Zealand* (online ed, New Zealand, 8 September 2020).
- 26 Frankie Sullivan "Not just language: an analysis of discursive constructions of disability in sentencing remarks" (2017) 31 *Journal of Media & Cultural Studies* 411 at 418.

about disability which meet the purposes of its definers.<sup>27</sup> The predominant models of disability are created by, and for the benefit of, those with the knowledge-producing power in society.<sup>28</sup>

### ***B The Story of the Medical Model of Disability***

Much to the criticism of activists and academics, disability has historically been seen as an individual issue. While the medical model is the focus of this article, disabled people have pointed to other discourses which individualise disability, such as the "tragedy model", "charity model", or the "moral model" which see disability as a "direct consequence of sin or fault ... and arises due to some inadequacy of the individual".<sup>29</sup> Some academics, such as Michael Oliver, simply use the umbrella term of "individual model" to refer to the attitude that an individual's social exclusion is a result of their deficient body or mind.<sup>30</sup> The medical model, however, has been popularised as the term for this phenomenon.

Heavily influenced by neo-Marxism, disability studies asserts that the advent of capitalism resulted in further economic and social exclusion of disabled people.<sup>31</sup> As a result, society was faced with an existential issue: what to do with those who "either cannot or will not conform to the norms and discipline of capitalist society"?<sup>32</sup> Consequently, the social and economic exclusion of disabled people became seen as the disabled person's individual responsibility. Disabled people were expected to embody Parsons' "sick role", whereby they are deemed ill or abnormal, and in need of medical intervention.<sup>33</sup> In fact, disabled people's inclusion in society is said to depend on them "wanting to get well".<sup>34</sup> This can be seen in New Zealand's accident compensation scheme (ACC), and the many ways it fails to benefit the disabled community. Under the scheme, disabled people who are injured on top of their disability are less likely to be able to access the weekly compensation scheme.<sup>35</sup> This is because they are less likely to be in paid work, or are in part-time work and therefore entitled to

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27 John M Conley, William M O'Barr and Robin Conley Riner *Just Words: Law, Language, and Power* (3rd ed, University of Chicago Press, Chicago, 2019) at 9.

28 Oliver, above n 14, at 43.

29 Stephen Bunbury "Unconscious bias and the medical model: How the social model may hold the key to transformative thinking about disability discrimination" (2019) 19 Int J Discrim Law 26 at 28.

30 Oliver, above n 14, at 43.

31 At 93.

32 At 93.

33 Jan Grue *Disability and Discourse Analysis* (Ashgate Publishing, Surrey, 2015) at 53.

34 Bunbury, above n 29, at 32.

35 See Accident Compensation Act 2001, ss 97–106, 112 and 113.

less.<sup>36</sup> This is particularly problematic considering weekly compensation under ACC amounts to 80 per cent of an individual's weekly income, which is typically much higher than what one may receive under other disability benefits.<sup>37</sup> Ultimately, this exemplifies the belief that disabled people should only be afforded adequate support if they contribute economically to society.

The main consequence of seeing disability as an individual and pathological issue is that it "relieves society of any obligation other than to care, treat or cure the person".<sup>38</sup> It prohibits us from considering how society *itself* is structured, "how it creates barriers to inclusion, and how it shares in the responsibility to eliminate barriers".<sup>39</sup>

### ***C Consequences of the Medical Model on Belonging***

Models of disability "exert a powerful influence on the public perception of disability and the public's response to people with disabilities".<sup>40</sup> Thus, while the medical model is associated with the medical field, it has "seeped into individuals' general psyche" and all areas of social life.<sup>41</sup> The prominence of the medical model of disability can explain harmful stereotypes and attitudes which fail to create spaces of belonging for disabled people in the modern world.

Perhaps most notably, in following a "deficiency" approach, the medical model has contributed to the view of disabled people as pitiable and in need of charity. Morrison, the mother of a disabled child in Aotearoa, has written that she has had to perpetuate the medicalisation of her child in order to obtain support, characterising his "disability as a personal tragedy" which goes entirely against her own personal beliefs about disability.<sup>42</sup> I have also experienced this in legal education, where well-meaning staff are quick to ask about details of my current "health" or speak to me in hushed tones about what extra support I may need from them. As a top student in their classes, it is condescending to have my existence minimised to a level of tragedy and deficiency where other students are afforded intellectually stimulating conversation.

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36 Emma Powell *ACC's delivery to priority populations: Part 4 – Disabled people* (Accident Compensation Corporation, GOV-010519, 4 June 2021) at 3.

37 See Welfare Expert Advisory Group *Whakamana Tāngata: Restoring Dignity to Social Security in New Zealand* (February 2019) for discussion of the discrepancies between payments under the accident compensation scheme and other disability benefits.

38 Kanter, above n 2, at 7.

39 At 7.

40 Julie F Smart "The Power of Models of Disability" (2009) 75 *Journal of Rehabilitation* 3 at 3.

41 Angélica Guevara "The need to reimagine disability rights law because the medical model of disability fails us all" (2021) 2 *Wis L Rev* 269 at 277.

42 Carey-Ann Morrison "A personal geography of care and disability" (2021) *Social & Cultural Geography* (forthcoming).

Through a process of reflected self-appraisal, the medical model also has the "capacity to shape the self-identity of those with disabilities" and their families.<sup>43</sup> Because the "cultural environment in which we all grow up usually sees impairment as unattractive and unwanted", disabled people and their families are so "immersed in the personal tragedy viewpoint" that it is not surprising that they find it difficult to respond to disability in any other way.<sup>44</sup> Disabled people are therefore likely to internalise attitudes about their existence being a tragedy, resulting in feelings of low self-confidence and self-worth.<sup>45</sup> Ultimately, the medical model fails to acknowledge the dynamic lived experiences of disabled people, turning our lives into "one-dimensional narratives" of loss, overcoming and tragedy.<sup>46</sup>

Another predominant consequence of the medical model is that, in focusing on an individual's body, the disabled population is not seen as a collective community facing social barriers. This fragmentation "discourages a broad coalition of people with all types of disabilities" by focusing on medical differences, as opposed to the joint experience of oppression.<sup>47</sup> This is problematic, as community-building is crucial for creating feelings of belonging in minorities.<sup>48</sup> Disability legislation and support schemes are also harmfully impairment-focused. For instance, Aotearoa's accident compensation scheme does not even include a legislative definition of disability, rather having to rely on medically-assessed labels such as "incapacity" and "permanent impairment".<sup>49</sup> In doing this, it "drives a focus on individual characteristics" and fails to acknowledge disabling social forces such as poor access to employment.<sup>50</sup>

Fragmenting the disabled population into impairment types also creates an unhelpful binary between those whom society sees as disabled, and those it does not. Guevara highlights the danger of this, for it ensures that:<sup>51</sup>

... gatekeepers make arbitrary decisions as to which disabilities will be provided reasonable accommodations or which disabilities pose an undue burden on those providing the accommodation, ... signal[ling] to the masses which disabilities will be considered credible and, therefore, a true disability.

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43 Smart, above n 40, at 3.

44 Oliver, above n 14, at 47.

45 Harpur, above n 12, at 166.

46 St Pierre and Peers, above n 1, at 1.

47 Smart, above n 40, at 4.

48 Morrison and others, above n 4, at 6.

49 Accident Compensation Act, ss 6 and (for example) 69(1)(d).

50 Powell, above n 36, at 3.

51 Guevara, above n 41, at 279.

Such fragmentation also inhibits the outcomes of any disability rights movement by distinguishing between the "deserving" and the "undeserving". There is, for instance, a discrepancy in New Zealand's Supported Living Payment benefit between blind citizens and other disabled people. Totally blind applicants do not have to declare any extra income to Work and Income. The wider disabled population, however, does.<sup>52</sup> The fragmentation of the disabled community by impairment type will never create a space of belonging for disabled people, as "[w]ith every instance of manufacturing, stigma is not eradicated but perpetuated and solidified in the masses' minds".<sup>53</sup>

Evidently, the medical model pathologised and individualised disability. While not denying the positive influence that medicine can play in disabled people's lives, this article and many disabled activists blame the medical model for existing social barriers and oppression.

### ***D New Zealand's Legal Obligations***

The medical model is also in conflict with New Zealand's obligations under domestic and international law. Under s 21 of the Human Rights Act 1993, disability is listed as a prohibited ground of discrimination. However, unless the medical model is dislodged from all facets of society, it is difficult to see how disability will ever be a social group that is on an equal footing with its nondisabled peers.

New Zealand also ratified the UNCRPD in 2008. Under the UNCRPD, there is a series of obligations relating to upholding the humanity of disabled people. The medical model reduces disabled people's existence to their impairment, thus seriously undercutting any sense of humanity. This contravenes art 17, for instance, which grants a "right of respect for a disabled person's physical and mental integrity". Evidently, New Zealand has both a legal and a moral obligation to create spaces of belonging for disabled people in all areas, including the law.

The medical model perpetuates stories about disabled people's lives which fail to live up to our colourful lived experiences. When these stories are articulated in the legal sphere, we hear the message that we do not belong as ourselves, but as caricatures. In the next part of this article, I will demonstrate how these negative stories are perpetuated by judicial language, in which the medical model is firmly lodged.

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52 Work and Income: Te Hiranga Tangata "Supported Living Payment" (22 November 2021) <[www.workandincome.govt.nz](http://www.workandincome.govt.nz)>.

53 Guevara, above n 41, at 279.

#### ***IV THE MEDICAL MODEL IN JUDICIAL LANGUAGE***

It is well established that discourse is where "words meet bodies".<sup>54</sup> The experience of this meeting "can be severely painful when the words do not fit, and have sharp, painful edges".<sup>55</sup> This has certainly been my experience when reading or discussing cases involving disabled plaintiffs, such as the instance previously discussed of whether the birth of a disabled person could be classified as an "accident". Certainly, "[w]ord choice can reveal values that reflect the speaker's beliefs about disability".<sup>56</sup> Therefore, it is absolutely crucial that the judiciary is held to a standard of language which reflects "an overdue recognition of the respect owed to people with different impairments".<sup>57</sup> Without this, the law will never be a space of belonging for disabled people.

*R v Knox*,<sup>58</sup> *KR v MR*<sup>59</sup> and *Western Bay of Plenty District Council v Limmer*<sup>60</sup> all deal with different legal issues; however, all three show the judiciary engaging with disability in a material way. These cases were selected to show the pervasiveness of the medical model in the language used by the judiciary, which can be categorised by the following: the language used to refer to disabled people themselves; the focus on the disabled body as deficient; the prominence of the "burden" narrative; and the general refusal to acknowledge disability as a socially oppressed minority group.

##### ***A The Cases and My Approach***

*KR v MR* was a High Court decision delivered by Miller J. It was an appeal brought by KR against a Family Court decision ordering the termination of KR's pregnancy and her sterilisation on the application of MR, who had been appointed KR's welfare guardian under the Protection of Personal and Property Rights Act 1988.<sup>61</sup> KR was a 29-year-old with a learning disability who had become pregnant after stopping her birth control medication. KR wanted to carry the baby to term, and to be its caregiver, and also to have more children afterwards.<sup>62</sup> The appeal was brought on three grounds:

- (1) KR was prejudiced by not being afforded sufficient time to prepare for the hearing;<sup>63</sup>

54 Grue, above n 33, at 54.

55 At 54.

56 Arlene S Kanter "The law: What's disability studies got to do with it or an introduction to disability legal studies" (2011) 42 Colum Hum Rts L Rev 403 at 433.

57 At 434.

58 *R v Knox* [2016] NZHC 3136.

59 *KR v MR* [2004] 2 NZLR 857 (HC).

60 *Western Bay of Plenty District Council v Limmer* [2020] NZDC 12902.

61 *KR v MR*, above n 59, at [1].

62 At [6]–[9] and [16]–[17].

63 At [38].

- (2) In making the termination order, the Court erred in weighing the "harm occasioned by a termination against only the harm occasioned by the child being removed", failing to look at other alternatives;<sup>64</sup> and
- (3) The sterilisation order was inappropriate as it failed to consider less invasive procedures, and also took into consideration the possibility that the child would also be disabled.<sup>65</sup>

While not disagreeing with the previous judgment, Miller J allowed the appeal on the grounds that KR was not afforded the opportunity to bring more evidence against the proposed order.<sup>66</sup>

*Knox* was a High Court decision delivered by Williams J, relating to the sentencing of Donella Knox. Donella was being sentenced for the murder of her autistic adult daughter, Ruby, of whom she was the primary caregiver.<sup>67</sup> Legally, the case dealt with the prima facie assumption that a charge of murder imposes life imprisonment unless it can be shown that it would be "manifestly unjust to impose that penalty" when looking at all the relevant circumstances.<sup>68</sup> Williams J found that the circumstances surrounding Ruby's murder were "exactly the kind of circumstances that the 'manifestly unjust' option now in place was designed to address".<sup>69</sup> Williams J also highlighted that "the 'conduct of the victim' is a mitigating factor in the Sentencing Act [2002], leaving some room for provocation type factors to be relevant in sentencing".<sup>70</sup> Based on these two points, Williams J sentenced Donella Knox to four years' imprisonment.<sup>71</sup>

*Western Bay of Plenty District Council* was a decision of the Tauranga District Court delivered by Judge Ingram. The issue in this case was:<sup>72</sup>

... whether s 118 of the Building Act 2004, in combination with the applicable human rights legislation, requires the provision of wheelchair access and wheelchair accessible toilet facilities in worker accommodation on a kiwifruit orchard owned by Mr Limmer and situated at Ronalds Lane Te Puke.

The decision was an appeal brought by the Western Bay of Plenty District Council against a decision by the Ministry of Business, Innovation and Employment that the Council had wrongfully declined consent to the proposal by Mr Limmer to turn an existing dwelling on his orchard into accommodation

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64 At [39].

65 At [44].

66 At [80].

67 *Knox*, above n 58, at [1].

68 At [3].

69 At [66].

70 At [66], citing s 9(2)(c).

71 At [80].

72 *Western Bay of Plenty District Council v Limmer*, above n 60, at [1].

for workers.<sup>73</sup> The New Zealand Kiwifruit Growers Association, the Office for Disability Issues, and the Human Rights Commission were also involved in the case.<sup>74</sup> Judge Ingram rejected the appeal on the basis that s 118 of the Building Act was not applicable, as the proposed building was not to be open to public use.<sup>75</sup> He also found that, even if s 118 was applicable, he would have rejected the appeal because modifications to the building would be an "unreasonable" accommodation.<sup>76</sup>

The scope of this article is to focus specifically on the linguistic construction of disability as per the medical model, and the negative consequences this has on disabled people engaging with the law. This article does not aim to (nor have the scope to) critique the substantive legal decisions that were reached by the judges. This follows the approach of previous critical legal theorists who have focused on the linguistic choices of judges in cases involving minorities.<sup>77</sup> I also do not deny the particular difficulties facing the judges. This is especially pertinent to my discussion of the tragic case of *Knox*, in which the inadequacies of our disability support system are material to the case. I wish to draw attention to the approach of Sullivan in analysing similar cases:<sup>78</sup>

... empathy for the offender cannot come at the cost of the agency and acknowledgement of the value of the lives of PWD [persons with disabilities]. The social inequalities tied up in care work need to be acknowledged in ways that do not reproduce the discriminatory assumptions that underpin ableist discourses.

### ***B "Suffering" and "Bound"***

In all three cases the judges use implicitly negative language to refer to disabled people. This is in direct conflict with the language preferred by socially oriented models of disability and a majority of the disabled population.

In *Knox*, Williams J frequently states that Ruby "*suffered*" from "*severe* intellectual disability".<sup>79</sup> Similar language is used by Miller J in *KR v MR* to refer to KR and other disabled people from the cases referenced: "KR *suffers* from an intellectual disability";<sup>80</sup> "[s]he *suffers* from a rare congenital

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73 At [3].

74 At [4].

75 At [34].

76 At [75].

77 See for example Edward Clark "The construction of homosexuality in New Zealand judicial writing" (2006) 37 VUWLR 199; and Sullivan, above n 26.

78 Sullivan, above n 26, at 413.

79 *Knox*, above n 58, at [9] and [14] (emphasis added).

80 *KR v MR*, above n 59, at [33] (emphasis added).

disorder";<sup>81</sup> "[she] was mentally *retarded* and *suffered* from a condition";<sup>82</sup> "[she] *suffered* severe deafness and epilepsy".<sup>83</sup> Such language highlights the pervasiveness of the medical model, which "views the individual with pity, as defective, or as having an impairment that must be eliminated, treated, or cured".<sup>84</sup> Framing disability as a tragedy contributes to the sense of othering disabled people experience, and it "diminishes the hidden gifts and intrinsic value people with disabilities provide by existing".<sup>85</sup>

Framing disability in this way also fails to recognise the actual lived experience of disabled people. Judge Ingram in *Western Bay of Plenty District Council* centres his discussion around "wheelchair bound workers".<sup>86</sup> He expresses disbelief that there is a "realistic possibility that any employer in the kiwifruit industry could presently even contemplate the employment of a wheelchair bound worker".<sup>87</sup> It is well known that such language ignores the lived realities of disabled people, who see mobility devices as a source of freedom and mobility. Even the Ministry of Social Development acknowledges that terms such as "wheelchair bound" and "suffers" negatively portray disabled people as victims of their impairment.<sup>88</sup> Such language highlights how the "medical model assumes that the disabled person's autonomy is limited due to the impairment", as opposed to barriers put on them by society.<sup>89</sup>

Structurally, this choice of language also shapes our perception of the issues in the cases. In using negative language to refer to disability, the judges succeed in justifying their rulings in favour of able-bodied norms. For instance, Williams J refers to Ruby's murder as similar to cases of "mercy killings".<sup>90</sup> In negatively framing Ruby's disability, his Honour implicitly suggests that the life of a disabled person is of less quality than that of a non-disabled person. This works to bolster his Honour's narrative that her murder was out of "mercy" and thus justifiable.

Whilst a different context, a similar technique is used by Judge Ingram in *Western Bay of Plenty District Council*. At the beginning of the judgment, his Honour uses the statutory language of "persons

81 At [6] (emphasis added).

82 At [67] (emphasis added).

83 At [71] (emphasis added).

84 Guevara, above n 41, at 278.

85 At 278.

86 *Western Bay of Plenty District Council v Limmer*, above n 60, at [51].

87 At [60].

88 Ministry of Social Development "Disability language – words matter" (6 May 2020) <[www.msd.govt.nz](http://www.msd.govt.nz)>.

89 Bunbury, above n 29, at 28.

90 *Knox*, above n 58, at [62], [71] and [73].

with disabilities".<sup>91</sup> It is only when he begins to discuss whether it is "reasonable" to require accessible toileting facilities that he begins to use the more coloured language of "wheelchair bound".<sup>92</sup> In doing this, his Honour suggests that a disabled person's use of mobility equipment is an example of reliance and inadequacy which is entirely incompatible with any form of physical labour. This "essentializes disability and perpetuates 'othering'".<sup>93</sup>

For a disabled person encountering the legal system, this language reflects the view that disability is inherently negative, unwanted, and tragic. Far from empowering, this language fails to recognise disability as a "positive and central" part of their identity".<sup>94</sup>

### ***C The Deficient Disabled Body/Mind***

All three cases demonstrate an intense fixation on the disabled body as deficient, even where it does not seem particularly relevant. This medicalised framing fails to create spaces of belonging for disabled people interacting with the law as it reminds them of the "set of assumptions (conscious or unconscious) and practices that promote the differential or unequal treatment of people because of actual or presumed disabilities".<sup>95</sup>

This is particularly obvious in *Knox*, as Williams J engages in the common technique of "listing", which draws "attention to the minutiae of everyday responsibility",<sup>96</sup> framing disability as an exceptional circumstance which warrants the "handing down of suspended sentences in response to what a less ableist society might perceive to be [murder]".<sup>97</sup> Williams J states:<sup>98</sup>

She also suffered from severe intellectual disability (a condition separate from her autism), chronic constipation, spina bifida, complications relating to spinal rod surgery undertaken when she was 13, gastro-oesophageal reflux, seasonal asthma and rhinitis, a history of anal fissures (related to the chronic constipation), haemorrhoids and incontinence, previous menstrual difficulties, and hip pain.

Williams J also draws a direct linguistic correlation between Ruby's disability and her perceived inability to contribute positively to society. In talking of the symptoms of her disabilities, he states: "Perhaps most significant of all she had no ability to empathise. She lived almost entirely within her

91 *Western Bay of Plenty District Council v Limmer*, above n 60, at [16].

92 At [51].

93 Guevara, above n 41, at 270.

94 Bunbury, above n 29, at 41.

95 Fiona Kumari Campbell *Contours of Ableism: The Productions of Disability and Aabledness* (Palgrave Macmillan, London, 2009) at 4.

96 Sullivan, above n 26, at 415.

97 At 417.

98 *Knox*, above n 58, at [9].

own shell".<sup>99</sup> Edwards suggests that such language is often used to negate the disabled victim as the "ideal victim" who is both vulnerable and blameless:<sup>100</sup>

... people with disabilities have certainly been seen as vulnerable, but are they seen as blameless? The idea that personal characteristics, or elements of lifestyle, make certain people disproportionately vulnerable to being a victim has more than a whiff of victim-blaming about it.

*KR v MR* and *Western Bay of Plenty District Council* also demonstrate this fixation on the disabled body (or mind) by focusing on particular impairment types. Throughout *Western Bay of Plenty District Council*, Judge Ingram refers to "wheelchair bound" people as those who would benefit from the accessible bathroom. He acknowledges that "wheelchair access toilets may be of some benefit" to others, but ultimately decides that such persons would not "necessarily be precluded" from employment if there was no accessible toilet.<sup>101</sup> Guevara suggests that this focus on impairment reinforces the "ability/disability" binary that is central to the medical model. In doing this, Judge Ingram constructs whom he deems disabled "enough" to warrant accommodation and, as such, leaves "those who are not able enough, yet not disabled enough, out in the cold".<sup>102</sup> This construction of disability undermines people's own lived experiences. It also goes against socially oriented models of disability, which would support a universal design approach, allowing for "social participation for all, providing for unforeseen beneficiaries whether they have a disability or not".<sup>103</sup>

In *KR v MR*, Miller J constantly brings our attention back to KR's deficient mind by repeating a variation of the following phrase multiple times throughout:<sup>104</sup>

... [KR has] no concept of abstract thinking, value of money, or consequences of her actions. She has little or no fear of anyone, and no concept of danger. She becomes frustrated when people try to support her, and is prone to become angry and distressed.

Even the judges' use of the term "intellectual disability" can be problematic, with "learning disability" being preferred by the New Zealand community.<sup>105</sup> It has been said that language used to refer to this community often "reduce[s] difficulties to an individual level, where the person with

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99 At [9].

100 Claire Edwards "Pathologizing the victim: law and the construction of people with disabilities as victims of crime in Ireland" (2014) 29 *Disability & Society* 685 at 689.

101 *Western Bay of Plenty District Council v Limmer*, above n 60, at [65]–[66].

102 Guevara, above n 41, at 277.

103 At 281.

104 *KR v MR*, above n 59, at [7].

105 See generally PeopleFirst New Zealand "About Us" <[www.peoplefirst.org.nz](http://www.peoplefirst.org.nz)>; and Oliver, above n 14.

[intellectual disability] is defined as embodying the 'problem' rather than the problem being the product of society's discourses about difference".<sup>106</sup>

### ***D The "Burden" Narrative***

By individualising disability, the medical model rules any extra support a disabled person may require as a load on society. This is a strong theme in all cases and sends a direct message to disabled people that their existence is burdensome.

Williams J explicitly refers to Ruby as a "burden" to those around her multiple times throughout the judgment in *Knox*. The decision is littered with sentences such as "the *burden* of Ruby's care lay with you, a *burden* you accepted willingly",<sup>107</sup> "[s]he was just *too big a handful*",<sup>108</sup> "being Ruby's mum was *exhausting*",<sup>109</sup> "[y]our life had been *entirely dominated by caring for Ruby*",<sup>110</sup> "Ruby's unresolved pain and the *burden* that placed on you ... left you with no viable alternative".<sup>111</sup> Despite acknowledging that Donella clearly loved her, Ruby is never described in a positive light. Rather, Williams J notes that Ruby never reciprocated Donella's affection and that their relationship "was akin to an abusive partner relationship where your care was met with repeated violence".<sup>112</sup> Unintentionally, Williams J paints Ruby as a loveless child, and Donella as someone who cared for her "constantly, diligently, unselfishly and unconditionally" despite this.<sup>113</sup> The negative construction of their relationship highlights how entrenched the medical model is, showing that:<sup>114</sup>

... the belief that [persons with disabilities] are dependent individuals who can only 'take from' rather than 'give to' society is so entrenched in our social consciousness that it has become a naturalized fact.

This burden narrative can also be seen in *Western Bay of Plenty District Council*, albeit more subtly. Judge Ingram uses absurdist techniques to suggest that accommodations for disabled people in this industry would be "unreasonable" given the economic burden it would place on society. "[I]t

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106 Rachel Cox, Biza Stenfert Kroese and Roger Evans "Solicitors' experiences of representing parents with intellectual disabilities in care proceedings: attitudes, influence, and legal processes" (2015) 30 *Disability & Society* 284 at 294.

107 *Knox*, above n 58, at [18] (emphasis added).

108 At [20] (emphasis added).

109 At [38] (emphasis added).

110 At [41] (emphasis added).

111 At [58] (emphasis added).

112 At [36].

113 At [18].

114 Carol Thomas *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology* (Palgrave Macmillan, Basingstoke, 2007) as cited in Sullivan, above n 26, at 414.

is difficult indeed to see", he says, "that there is a realistic possibility that any employer in the kiwifruit industry could presently *even contemplate* the employment of a wheelchair bound worker".<sup>115</sup> Judge Ingram also uses the technique of rhetoric to emphasise the "absurdity" of the suggestion: "Could a worker so disabled as to require wheelchair access to a toilet realistically expect to safely and economically carry out such work?".<sup>116</sup> Such phrasing encourages the balancing between human rights and economic benefit. Certainly, Judge Ingram concludes that the costs of accommodation are "real, while any possible benefit can only presently be hypothetical".<sup>117</sup> The balancing between what is "reasonable" and economically viable has become "rooted in assisting individuals with disabilities to fit into existing systems rather than in fixing the systems that disable and use an able body standard".<sup>118</sup>

Consequently, these types of stories suggest that disabled people's inclusion or belonging in non-disabled spaces is always conditional on positive or economic contribution. Undeniably, this narrative fails to create a space of belonging for disabled people in the legal system.

### ***E Disabled People as an Oppressed Minority***

Finally, all three cases fail to acknowledge disabled people as an oppressed minority—a direct result of the medical model of disability. At the beginning of his judgment, Williams J notes that he wishes to emphasise that Ruby's "disability in no way reduces the value of her life".<sup>119</sup> His Honour then follows this, however, by saying that he ought to be careful to "uphold the rights of the weak, the vulnerable and the disabled".<sup>120</sup>

Vulnerability is also a theme in *KR v MR*, as KR is frequently said to be "vulnerable" to manipulation.<sup>121</sup> Referring to disabled people's vulnerability without discussion of social barriers suggests that they are innately vulnerable, as opposed to being "made so by a social environment that devalues human difference".<sup>122</sup> This reduces society's role in ableism, turning it into an individual

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115 *Western Bay of Plenty District Council v Limmer*, above n 60, at [60] (emphasis added).

116 At [54].

117 At [74].

118 Guevara, above n 41, at 287.

119 *Knox*, above n 58, at [4].

120 At [4].

121 *KR v MR*, above n 59, at [10] and [19].

122 Maretha de Waal "Exploring gender and disability stereotypes in the courtroom: A case example" (2015) 29 *Agenda* 34 at 37–38.

problem. As a result, discrimination and even violence against disabled people is seen as "fundamentally different to those experienced by non-disabled people".<sup>123</sup>

As a disabled woman, I can confirm that we are acutely aware that we are at a greater risk of becoming victims of violent crime. Instead of viewing this as the result of ableist structures and attitudes, labelling disabled people as inherently "vulnerable" minimises their experience as an oppressed minority alongside the likes of women, racial minorities, and sexual minorities.

All three of the judges seem aware that these cases involve issues of discrimination and ableism. However none critically engages with the issue or directly names it. In *KR v MR*, Miller J notes that "[t]here is evidence that disabled people may see sterilisation as a symbol of reduced or degraded status".<sup>124</sup> However, his Honour makes no attempt to discuss this "evidence" or include any comment from disabled activists.

Similarly, Judge Ingram notes that he does not "overlook the 'forward looking' approach to disability issues that can be discerned both in the legislative provisions and the cases referred to".<sup>125</sup> However, his Honour only briefly discusses the obligations New Zealand has to disabled people under the Human Rights Act and the UNCRPD, whilst spending seven paragraphs discussing the way these obligations can be circumvented.<sup>126</sup>

Further, Williams J in *Knox* briefly mentions the role that a perceived lack of social support had in Ruby's death. However, his Honour is careful to state that this was only Donella's "perception", and he only spends a minimal amount of time discussing this lack of support in comparison to highlighting the details of Ruby's condition.<sup>127</sup>

It is evident that the medical model is entrenched in judicial attitudes to disability, resulting in the articulation of harmful stories and narratives. As MacDougall said, "Judicial expression influences the attitudes of the public, legislation, bureaucrats, and other judges".<sup>128</sup> Thus, when unchallenged, these stories send an implicit message to disabled people in interaction with the legal sphere that they do not belong, nor are they welcome. However, I, and critical legal theorists before me, do not argue that these cases should be avoided by legal academics. Rather, I argue that the harmful effect of this

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123 Katharine Quarmby "Media reporting and disability hate crime" in Alan Roulstone and Hannah Mason-Bish (eds) *Disability, Hate Crime and Violence* (Routledge, London, 2012) 64 at 68.

124 *KR v MR*, above n 59, at [73].

125 *Western Bay of Plenty District Council v Limmer*, above n 60, at [67].

126 See generally [38] to [47].

127 *Knox*, above n 58, at [33].

128 Bruce MacDougall *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (University of Toronto Press, Toronto, 1999) at 5.

language could be alleviated if legal academics critically challenged these narratives. As it stands, however, legal pedagogy is equally complicit with medicalised conceptions of disability.

## V THE MEDICAL MODEL IN LEGAL PEDAGOGY

I once attended a lecture discussing *Brimelow v Casson*, a case in which the fact that a young woman "was living in immorality with ... a dwarf" was considered material to the case.<sup>129</sup> This was mentioned in humorous passing, perhaps to highlight how archaic a lot of case law is. However, instead of critically engaging with the overt ableism, the class quickly moved on to discuss the substantive law which arose from the case. This is a perfect example of legal education's "critical avoidance" of disability issues.<sup>130</sup> This creates a "manifestly academic form of Othering" for disabled students of the law, acting as another reminder that we do not belong other than as stereotypes.<sup>131</sup>

Queer, feminist, and critical race theorists have found that this experience is common for all minorities, and is a result of what they call the critique of subordination in legal pedagogy. This critique finds that:<sup>132</sup>

... the great failing of legal education [is] the way it privileges and perpetuates existing social, economic, and political hierarchies based on race and gender, all in the name of neutral, objective law.

It is argued that legal education requires students to "think like a lawyer", meaning:<sup>133</sup>

... to think like the stereotype of a lawyer as a white, straight, upper-class male, preferably Protestant and able-bodied enough to play golf. Political perspectives are discouraged, and emotions exist to be manipulated.

Certainly, while the experiences of being queer and disabled are different, I empathise with the writing of queer legal academics. Mary Becker, for instance, has written that there is great pain of "being 'out' in an environment in which 'reasonable' people ... can disagree about whether you are entitled to basic human dignity and respect".<sup>134</sup> For all minorities, disabled people included, law school is a place that fails to "[leave] us feeling like full human beings".<sup>135</sup>

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129 *Brimelow v Casson* [1924] 1 Ch 302 (Ch) at 43.

130 Bolt, above n 7, at 2.

131 At 2.

132 Brooks and Parkes, above n 18, at 105.

133 Ruthann Robson *Lesbian Out Law: Survival Under the Rule of Law* (Firebrand Books, United States, 1992) as cited in Brooks and Parkes, above n 18, at 109.

134 Mary Becker "Foreword: Becoming Visible" (1995) 11 Nat'l J Sexual Orientation L 146 at 146–147 as cited in Brooks and Parkes, above n 18, at 96.

135 Brooks and Parkes, above n 18, at 90.

Traditionally, conversations about disability in the legal context have been impairment-focused. It has been observed that:<sup>136</sup>

... law students who "study disability in the context of medical negligence, personal injuries, social welfare, health law or social care law" are likely to come away with a "medicalised view of disability".

Certainly, when I told interested legal academics that I was focusing this article on disability, they assumed it was in the area of health law or personal injury law as opposed to critical legal theory.

The prevalence of the medical model of disability in legal pedagogy is not just an emotive issue. It has contributed to maintain the status quo in legal education, meaning that "students' requests for accommodations such as extra time, alternative assessment regimes ... may not be regarded favourably by academics or by the rest of the student cohort".<sup>137</sup>

This is highlighted by the fact that, at Victoria University of Wellington, less than eight per cent of students taking LAWS301 self-identify as disabled.<sup>138</sup> In 2021, eight students out of 89 in the Honours programme identified as being disabled.<sup>139</sup> In 2020, two students out of 91 identified as such.<sup>140</sup> If one in four New Zealanders are disabled, these statistics suggest that legal education as it stands is not a space of belonging for disabled students.

To make law school a place of belonging for disabled students, legal academia must challenge medical models of disability. This will alleviate the impact of the narratives espoused by the judiciary, and it will create a future generation of judicial actors who view disability in a positive light. Morrison and others suggest that "cripping" space can turn it into a place of belonging for disabled people. This can be achieved by "identifying and subverting taken-for-granted and invisible able-body norms".<sup>141</sup> In other words, the legal sphere must work to adopt a socially oriented model of disability.

## ***VI "CRIPPING" THE LEGAL SPHERE***

In the final part of this article, I will provide an alternative to the medical model of disability based on the traditional social model of disability, and an indigenous model as articulated by Dr Huhana

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136 Eilionóir Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, London, 2015) as cited in Anna Lawson "Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?" (2020) 47 *JL & Soc* 558 at 565.

137 Frances Gibson "Disability and the legal profession in the United States" (2011) 19 *J Law Med* 101 at 105.

138 "Disabled Students at VUW Law School" (28 April 2021) (obtained under Official Information Act 1982 request to Victoria University of Wellington). LAWS301 (Property Law) is a compulsory paper for all law students at Victoria University of Wellington.

139 At 6.

140 At 6.

141 Morrison and others, above n 4, at 2.

Hickey and Denise Wilson.<sup>142</sup> Together, these models offer a "socially oriented" view of disability which enhances the mana and autonomy of individual disabled people. This socially oriented view of disability should be incorporated into legal pedagogy through a "cripping" of the LLB.

The term "crip", short for "cripple", has been reclaimed by the disabled community as a source of identification and political strategy. The reclaiming of harmful language is a tool used by minorities to take power from their oppressors. For instance, the LGBTQ+ community has similarly reclaimed the term "queer". The process of "cripping" involves revealing the arbitrary delineation between disabled bodies/minds and otherwise "normal" bodies/minds.

### ***A The Social Model of Disability***

The social model of disability is a direct reaction against the medical model. Michael Oliver, often cited as the "inventor" of the social model, demonstrates this by showing the different approaches each model would take to the "issues" facing disabled people: where the individual model focuses on treatment, the social model focuses on social action; where the individual/medical model focuses on policy, the social model focuses on politics; and so on.<sup>143</sup> Ultimately, the social model:<sup>144</sup>

... [turns] the understanding of disability completely on its head by arguing that it [is] not impairment that [is] the main cause of the social exclusion of disabled people but the way society responded to people with impairments.

The distinction between "impairment" and "disability" is crucial to the social model of disability. In 1976, two organisations, the Union of the Physically Impaired Against Segregation and the Disability Alliance, published *The Fundamental Principles of Disability* in which this distinction was first articulated:<sup>145</sup>

In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society.

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142 Huhana Hickey and Denise Wilson "Whānau Hauā: Reframing disability from an Indigenous perspective" (2017) 6 MAI Journal 82.

143 Oliver, above n 14, at 45.

144 Michael Oliver "The Social Model in Action: if I had a hammer" in Colin Barnes and Geof Mercer (eds) *Implementing the Social Model of Disability: Theory and Research* (The Disability Press, Leeds, 2004) 18 at 19.

145 Union of the Physically Impaired Against Segregation and Disability Alliance *Fundamental Principles of Disability* (London, 1976) at 3.

As opposed to a medicalised problem within an individual, the social model sees "disability as the disadvantage or restriction of activity caused by a contemporary social organisation".<sup>146</sup>

In politicising disability, the social model creates a space of belonging for disabled people by providing "the basis for a stronger sense of identity".<sup>147</sup> Importantly, it refuses to fragment and divide the disabled population by impairment. Oliver's definition of a disabled person as per the social model is according to the following three broad criteria:<sup>148</sup>

- (1) They have an impairment.
- (2) They experience oppression as a consequence.
- (3) They identify themselves as a disabled person.

The social model sees disabled people as part of a larger identity group. This had a huge impact on the emotive and embodied experiences of being disabled, as instead of "feeling ashamed of impairment, activists could deny that impairment was relevant to their situation".<sup>149</sup> For the first time, in resisting the individualisation of disability, the issues facing disabled people became something external to themselves. If "models of disability have the capacity to shape the self-identity of those with disabilities", then the social model is clearly crucial in creating spaces of belonging for disabled people.<sup>150</sup>

### ***B Indigenous Models of Disability***

The social model lends itself naturally to an intersectional and nuanced approach to disability and identity. The traditional social model arose from "the belief that political-economic forces and structures are paramount in shaping society".<sup>151</sup> It recognised disability as something that society created out of the normalisation of the white, male, colonising, neurotypical, and able body. Its strength lies in its ability to acknowledge how society also oppresses "women and certain racial groups on the basis that those groups lacked the physical and/or mental capabilities of the controlling group in society".<sup>152</sup> Therefore, correctly applied, the social model has the capacity to acknowledge and enhance disabled people's intersecting identities. However, the social model originates mostly from the work of physically disabled English men. In an Aotearoa context, it therefore falls "short in

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146 At 14.

147 Tom Shakespeare *Disability Rights and Wrongs Revisited* (2nd ed, Routledge, London, 2013) at 20.

148 Oliver, above n 14, at 90.

149 Shakespeare, above n 147, at 20.

150 Smart, above n 40, at 3.

151 Grue, above n 33, at 35.

152 Harpur, above n 12, at 164.

explaining Indigenous experiences of disability".<sup>153</sup> As Hickey and Wilson emphasise, it is crucial to recall that "Indigenous people have additional and diverse historical and contemporary impacts of disablement arising from colonisation, societal discourses about racism, subjugation and dysfunction that are in themselves disabling".<sup>154</sup> Colonisation introduced Western notions of individualism to disability, and this ought to be recognised in a New Zealand approach to disability.<sup>155</sup>

Hickey and Wilson propose that Whānau Hauā is an indigenous model through which disability can be framed. In te ao Māori, "disability is positioned within a person's background, coming to the forefront in times of need and compromised ability to achieve or undertake necessary activities".<sup>156</sup> As a result, Whānau Hauā acknowledges that "barriers to daily life do not originate from the disabled person".<sup>157</sup> This social or collectivist approach may seem similar to the traditional social model of disability. However, critically, Whānau Hauā is distinct in the "added cultural dimension of whānau working together to restore balance in their lives".<sup>158</sup>

Given the English context of the traditional social model, it is incapable of encapsulating rich tikanga such as whanaungatanga<sup>159</sup> and manaakitanga.<sup>160</sup> To create a space of belonging for all disabled people in a uniquely Aotearoa context, narratives of disability must be capable of encapsulating these cultural values. Because of this, I will refer to "socially oriented models" of disability to include both the traditional social model and more nuanced approaches such as Whānau Hauā.

In outlining both the traditional social model and Whānau Hauā, I offer alternative framings of disability which are mana-enhancing.

### ***C "Crippling" the LLB?***

"Crippling" the LLB would require incorporating socially oriented models of disability into legal pedagogy. This would recognise disabled people as an identity group, who face social oppression by ableist forces in society. In doing this, the legal sphere would become a "space of belonging" for disabled people. To achieve this, legal academics ought to critically engage with disability issues in

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153 Hickey and Wilson, above n 142, at 85.

154 At 85.

155 At 89.

156 At 86.

157 At 86.

158 At 87.

159 Whanaungatanga refers to the interrelationship of Māori with their ancestors; relationships, kinship, a sense of family connection: Hickey and Wilson, above n 142.

160 Manaakitanga means to support, take care of, protect: Hickey and Wilson, above n 142.

ways that go beyond medicalised narratives. In other words, disability legal studies ought to take up space in the LLB.

A disability studies approach to legal education would engage in "questions about law's role in creating, perpetuating, resisting, and contesting disablement – important questions with profound implications for social justice".<sup>161</sup> As with all areas of critical legal studies, this would necessarily require critical engagement with the attitudes expressed by our judicial actors. This is because critical legal theory acknowledges that "it is within the details of talk that constitutes legal practice that discrimination occurs, the patriarchy manifests itself, and that the power of the law is realized".<sup>162</sup> Such an approach would teach students what language is appropriate to use when referring to disabled people. This is crucial given that "the way in which a judge tells the story that led to a court case has the effect of solidifying the particular narrative adopted by the judge".<sup>163</sup> Certainly, as Kanter articulates:<sup>164</sup>

In a profession that relies so much on the written and spoken word, don't we need to invite our students to think about how we refer to other people? Who has the right to decide what any given group of people should be called? Which words hurt and should be avoided, and which bring pride and should be used? What does one's word choice generally reveal about our values and our point of view?

In doing this, judicial attitudes would be challenged and unpacked, and the medical model would slowly become dislodged from the legal sphere both at the pedagogical and judicial level.

## **VII CONCLUSION**

One in four New Zealanders are disabled. Of the clients whom lawyers see, one in four will be disabled. The legal sphere must become a place where disabled people belong, so that one in four of all future lawyers, judges, academics, and professors are proudly disabled. To achieve this, the legal sphere must resist the "one dimensional narratives" about disabled people that are currently dominant and recognise disability as an identity group which faces socially constructed barriers.<sup>165</sup> At the judicial level, this will occur in the recognition that language can shape how disability is seen and responded to and thus must be used responsibly. At the pedagogical level, legal education must become a space in which students do not have to "hang their personal skins on hooks outside the door of the law school to be collected".<sup>166</sup> Ultimately, if the legal sphere can undergo a process of

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161 Flynn, above n 136, at 559.

162 Conley, O'Barr and Conley Riner, above n 27, at xii.

163 Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand, Te Rino: A Two-Stranded Rope* (Hart Publishing, Oxford, 2017) at 35.

164 Kanter, above n 56, at 433.

165 St Pierre and Peers, above n 1, at 1.

166 Brooks and Parkes, above n 18, at 90.

"cripping", and adopt a socially oriented view of disabled people, it may become a space of belonging for students like myself.

I hope for a legal sphere which tells stories in which I, we, truly belong—stories that are not one dimensional but recognise the colour and diversity of our lives. These stories will be stories

Of strength

Protest

Intersectionality

Love

Beauty

Pride

Stories of Me. Of You. Of Us.